

IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
ITA No.746/Mum/2022
(A.Y. 2017-18)

Brightstar Infrastructure Private Limited 610, Tulsiani Chambers Nariman Point, Mumbai – 400021	Vs.	Additional/Joint/Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer, National Faceless Assessment Center, Delhi
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACCB8367Q		
Appellant	..	Respondent

Appellant by :	Ketan Ved/Ms. Urvi Mehta/ Abdulkadir Jawadwala
Respondent by :	Aditya M Rai

Date of Hearing	22.06.2023
Date of Pronouncement	30.06.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

This appeal filed by the assessee and directed against the order passed by the AO: NFAC, dated 23.02.2022 for A.Y. 2017-18 as per the direction of the DRP issued u/s 144C(5) of the Act. The assessee has raised the following grounds before us:

The Id Assessing Officer [AD], Ld. Transfer Pricing Officer [TPO] and Hon'ble Dispute Resolution Panel (DRP) erred in law and in fact in assessing the total income of INR 4,50,34,428 as against returned income of INR 2,55,74,350 as computed by the Appellant in its return of income

Transfer Pricing adjustment on account of payment of interest on Fully Compulsory Convertible Debentures ("FCCDs") - INR 2,02,60,078

1. On the facts and circumstances of the case and in law, the order passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (the Act) by the Ld. AO is erroneous and bad in law;
2. The Ld AO/TPO/ Hon'ble DRP has erred in upholding transfer pricing addition of INR 2,02,60,078 on account of an adjustment to Arms Length Price (ALP) of the

international transaction pertaining to payment of interest on FCCDs by the Appellant to its associated enterprise ("AE"),

3. *The Ld AO/1PO/Hon'ble DRP erred rejecting benchmarking approach as per Transfer pricing documentation and disregarded judicial precedents relied upon by the Appellant to justify ALP of interest on FCCDs in accordance with Chapter X of the Act.*
4. *The Ld AD/Hon'ble DRP erred in considering issue of FCCDs as quasi-equity in nature and accepted arbitrary selection of purported comparable instruments by Ld. TPO without cognizance to various comparability factors such as date of issue, type of instrument, issue size, security, tenor, credit rating, etc.;*
5. *The Ld AO/Hon'ble DRP erred in rejecting the additional analysis submitted by the Appellant based on comparability factors for benchmarking international transaction relating to payment of interest on FCCDs;*
6. *The Ld AO erred in not mentioning date of receiving directions from the Hon'ble DRP and Issued impugned order beyond the period of limitation prescribed under section 144C of the Act;*
7. *The Ld. AO/ Ld. TPO erred in not examining the validity of initiation of penalty proceedings u/s 270A of the Act;*
8. *The Ld. AO erred in charging and computing interest under section 234B and 234C of the Act.*

The Appellant craves leave to add, alter, modify, and withdraw all or any of the above grounds of appeal at or before the time of hearing of the appeal. For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided."

Additional Ground:

1:0 Re: Validity of Order

- 1:1 *The Assessing Officer has erred in passing the draft Assessment Order dated 17 March 2021 without following the procedure laid down in section 144C of the Income-tax Act, 1961 and therefore the said Order ought to be held as void ab initio, and consequently the entire assessment proceedings ought to be quashed.*
- 1:2 *The Appellant submits that the Assessing Officer has erred in issuing Notice of Demand dated 17 March 2021 u/s 156 of the Act alongwith the draft Assessment Order thereby not following the procedure laid down u/s. 144C of the Act.*
- 1:3 *The Appellant submits that the draft Assessment Order passed u/s 143(3) r.w.s 144C(1) of the Act be struck down as void-ab-initio and bad in law and consequently the entire assessment proceedings ought to be quashed*

2:0 Re: General:

- 2:1 *The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."*

2. Fact in brief is that return of income declaring total income at Rs.255,74,350/- was filed on 28.10.2017. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 22.08.2018. The assessee company Brightstar Infrastructure Private Limited incorporated on 26.,07.2005. The company is a joint venture between Ruchi Reality Holding Limited and

Shubham S.A. Investment LLC, holding 55% and 45% stake respectively in the company. The company was engaged in the business of real estate development.

3. In the case reference u/s 92CA(1) of the Act was made to Transfer Pricing Officer vide letter dated 18.09.2019 by the assessing officer. The reference has been made for determination of arm's length price in respect of the transaction entered into by the assessee with its associated enterprise as reported in Form 3CEB filed by the assessee. Vide order dated 29.01.2021 passed u/s 92CA(3) of the Act, the TPO has made an adjustment of Rs.202,60,078/- in relation to the international transactions reported by the assessee in Form 3CEB with its associated enterprises relevant to assessment year 2017-18.

4. The assessee has filed objections before the Dispute Resolution Panel against the variation proposed by the assessing officer in the draft assessment order of Rs.202,60,078/- as a TP adjustment holding that the international transaction of payment of interest of FCCDs to the assessee from its AE was not at arm's length. The DRP vide directions u/s 144C(5) of the Act dated 29.12.2021 rejected the objections filed by the assessee. The assessing officer has passed final assessment order u/s 143(3) on 23.02.2022 and total income was assessed at Rs.458,34,428/- after including the transfer pricing adjustment as discussed above.

5. During the course of appellate proceedings before us in respect of additional ground filed by the assessee at the outset the ld. Counsel submitted that at the stage of passing draft assessment order the assessing officer has also issued noticed

of demand u/s 156 of the Act along with computation dated 17.03.2021. Therefore, the assessment order passed subsequent to the issue of draft assessment order is bad in law and not valid. In support of his contention the ld. Counsel has placed reliance on the decision of Hon'ble High Court of Karnataka in the case of CIT(IT) Vs. Cisco Systems Services B.V. (2023) 149 taxman.com 486 (Karnataka). The ld. Counsel also placed reliance on the decision of coordinate benches of the ITAT, Mumbai in the following cases i.e (i) Marriott International Licensing Company BV Vs. DCIT(IT) 3(2)(1) vide ITA No.1621/Mum/2021 for AY 2014-15 dated 03.02.2023; (ii) Aker Powergas P. Ltd. Vs. The DCIT, Circle 15(1)(1) vide ITA No. 7211/Mum/2017 for A.Y. 2013-14 dated 23.06.2022.

6. The ld. Counsel submitted that additional ground is the legal ground challenging the validity of the assessment order on the ground that the draft assessment order dated 17.03.2021 was passed without following the procedure laid down in the Sec.144C of the Act and no further documentary evidences is required to adjudicate these grounds. After considering the decision of Hon'ble Supreme Court of India in the case of the National Thermal Power Company Vs. CIT (229 ITR 386) these ground of appeal are admitted and are taken up for adjudication.

On the other hand, the ld. D.R supported the order of lower authorities.

7. Heard both the parties and perused the material on record. The assessing officer has passed the draft assessment order u/s 144C of the Income Tax Act 1961 on 17.03.2021. In the draft assessment order AO has made TP adjustment of Rs.202,60,078/- and total income was assessed at

Rs.458,34,428/- . On perusal of the draft assessment order it is also noticed that assessing officer has also mentioned that the assessment of income is done as per computation sheet and the sum payable is determined as per the demand notice. We have further noticed from the copy of notice of demand u/s 156 of the Income Tax filed by the Id. Counsel that the assessing officer has issued this notice of demand to the assessee company along with draft assessment order on 17.03.2021 directing the assessee that for the assessment year 2017-18 a sum of Rs.101,06,120/- has been determined to be payable by the assessee. The relevant part of the notice of demand is reproduced as under:

GOVERNMENT OF INDIA MINISTRY OF FINANCE INCOME TAX DEPARTMENT National e-Assessment Centre Delhi			
To, BRIGHTSTAR INFRASTRUCTURE PRIVATE LIMITED 610 TULSIANI CHAMBERS NARIMAN POINT MUMBAI 400021, Maharashtra India			
PAN: AACCB8367Q	Date: 17/03/2021	Status: COMPANY	DIN & Notice No. ITBA/AST/S/156/2020- 21/1031563253(1)
Subject: Notice of demand under section 156 of the Income-Tax Act, 1961			
<p>1. This is to give you notice that for the assessment year 2017-18 a sum of Rs. 1,01,06,120, details of which are given on the reverse, has been determined to be payable by you.</p> <p>2. The amount should be paid to the Manager, authorised bank/State Bank of India within 30 days of the service of this notice. A challan is enclosed for the purpose of Payment.</p> <p>3. If you do not pay the amount within the period specified above, you shall be liable to pay simple interest at one per cent for every month or part of a month from the date commencing after the end of the period aforesaid in accordance with section 220(2).</p> <p>4. If you do not pay the amount of the tax within the period specified above, penalty (which may be as much as the amount of tax in arrear) may be imposed upon you after giving you a reasonable opportunity of being heard in accordance with section 221.</p> <p>5. If you do not pay the amount within the period specified above, proceedings for the recovery thereof will be taken in accordance with sections 222 to 227, 229 and 232 of the Income-tax Act, 1961.</p> <p>6. If you intend to appeal against the assessment, you may present an appeal under Part A of Chapter XX of the Income-tax Act, 1961, to the CIT Appeal NFAC within thirty days of the receipt of this notice, in Form No. 35, duly stamped and verified as laid down in that form.</p>			
Yours faithfully, Additional / Joint / Deputy / Assistant Commissioner of Income Tax/ Income-tax Officer, National e-Assessment Centre, Delhi			
Signature Not Verified Digitally signed by Chandan Kumar Srivastava Date: 2021.03.17 17:35:13 IST			

8. The ld. Counsel has also filed copy of computation sheet dated 17.03.2021 as per which the total demand payable of Rs.101,06,122/- was determined on the basis of draft assessment order for which the impugned demand notice as referred above was issued to the assessee. It is evident from the above that assessing officer has passed the draft assessment order on 17.03.2021 and also issued notice of demand u/s 156 along with computation sheet dated 17.03.2021. These facts demonstrate that assessing officer has not followed the mandatory provisions of Sec. 144C of the Act while issuing draft assessment order along with demand notice and computation sheet in the case of the assessee. In this regard, we have perused the decision of Hon'ble High Court of Karnataka in the case of CIT(IT) Vs. Cisco Systems Services B.V. (2023) 149 taxman.com 486 (Karnataka) wherein held that at stage of passing draft assessment order, the ACIT also issued a demand notice, procedure followed by ACIT was contrary to law and said mistake could not be cured u/s 292B of the Act. Further on the similar issued and identical fact we have also perused the decision of coordinate bench of ITAT in the case of Aker Powergas P. Ltd. Vs. The DCIT, Circle 15(1)(1). The relevant part of the decision is reproduced as under:

"019. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly the draft assessment order passed by the learned assessing officer on 21/12/2016 is accompanied with the notice of demand as well as show cause notice u/s 274 read with Section 271 (1) (c) of the act of the even date. Issue that arises is Whether draft assessment order accompanied with [1] Notice of Demand, [2] tax Computation sheet and [3] Show Cause Notice for penalty u/s 271 (1) (C) of the act, can it be considered as draft assessment order or a final assessment order. If it is a final assessment order then naturally the procedure laid down under the act has not been followed by the ld AO. In such circumstances, the assessment order passed by the ld AO becomes void ab initio and to be quashed.

020. *We find that identical issue has been considered by the coordinate bench in 649/ Pun / 2013 in case of Atlas corpo India Ltd vide order dated 29/8/2019 wherein it has been held as Under:-*

“7. Briefly stated, the facts of the case are that the assessee filed its return declaring income of ₹ 1,44,59,01,250/-. Certain international transactions were reported by the assessee. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the arm’s length price (ALP) of the international transactions. The TPO passed the order u/s. 92CA(3) of the Act proposing transfer pricing adjustments. Then, the AO passed the order u/s.143(3) of the Act on 29-12-2011 marking it as “Assessment order”. At the end of this order, the AO remarked that: ‘This is the proposed order of assessment passed u/s.143(3) r.w.s.144C(1) of the Income Tax Act, 1961’ determining the total income at ₹ 1,56,72,76,785/-. The assessee was also made aware that: ‘within 30 days of the receipt of this draft order’, it should either file acceptance to the variations or file objections to such variations before the Dispute Resolution Panel. Thereafter, the AO proceeded to calculate tax in the same order directing to “Issue demand notice and challan accordingly after giving credit to prepaid taxes, if any’ and further directing to ‘Issue notice u/s.274 r.w.s. 271(1)(c) of the I.T. Act, 1961”. A demand notice dated 29-12- 2011 was also simultaneously issued, a copy of which has been placed on record by the ld. AR. Then, the AO issued penalty notice u/s.274 r.w.s. 271(1)(c) of the Act, again, on 29-12-2012, whose copy has also been placed on record. Thereafter, the AO passed the final assessment order dated 27-02-2012 u/s.143(3) r.w.s. 144C of the Act determining total income at ₹ 156.73 crore.

8. From the above factual matrix, it is seen that the AO passed the draft order by designating it as the “Assessment order” u/s 143(3) of the Act on 29-12- 2011 and also issued notice of demand u/s.156 along with initiation of the penalty proceedings.

Thereafter, he passed the final assessment order again characterizing it as ‘Assessment order’ on 27- 2-2012. Under such circumstances, the assessee has raised the issue that the final assessment order lacked validity and hence should be quashed as the AO/TPO failed to follow the statutorily prescribed procedure u/s.144C of the Act.

9. Section 144C of the Act with the marginal note “Reference to Dispute Resolution Panel” provides through sub-section (1) of section 144C that: “The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.’ Subsection (2) of section 144C states that the assessee shall either file his acceptance to the AO

on the variations proposed in the draft order or file his objections, if any, with the DRP. In case, the assessee accepts the variation in the draft order or no objections are received within 30 days, then subsection (3) states that: 'The Assessing Officer shall complete the assessment on the basis of the draft order'. In case, the assessee does not agree with the draft order, it can, inter alia, raise objections before the DRP, which shall issue directions under subsection (5) of section 144C. Upon receipt of the directions from the DRP, the AO completes the assessment under sub-section (13) in conformity with the directions given by the DRP.

10. An overview of section 144C of the Act deciphers that a draft order passed under sub-section (1) is only a tentative order which does not fasten any tax liability on the assessee. In case variations to the income in the draft order are accepted by the assessee or no objections are received within 30 days, the AO completes the assessment under section 144C(3) on the basis of draft order and the matter ends. In case the assessee objects to the variations in the income as proposed in the draft order and approaches the DRP, the final assessment order is passed by the AO u/s.144C (13) giving effect to the directions given by the DRP under sub-section (5). In case the assessee seeks to take the route of seeking redressal of its grievances through the channel of the CIT(A), in that case, again the AO has to pass a separate assessment order, which is obviously distinct from the draft order. So, it is only on the finalization of the variation in the income as per the draft order, to the extent specified in the provision, that the AO is obliged to pass an assessment order, either under sub-section (3) or (13) of section 144C of the Act, determining the tax liability, pursuant to which a notice of demand is issued. Thus it follows that, irrespective of the course of action followed by the assessee, whether or not accepting the variation in the draft order or choosing the route of the DRP or the CIT(A), a draft order has to be necessarily followed by an assessment order on the basis of which a notice of demand is issued and it is then that the assessment is said to have come to an end.

11. The Hon'ble Apex Court in Kalyan Kumar Ray (1991) 191 ITR 634 (SC) has held that assessment order involves determination of income and tax. It laid down that: 'Assessment' is one integrated process involving not only the assessment of the total income but also the determination of the tax. The latter is as crucial for the assessee as the former.' Again the Hon'ble Summit Court in Auto and Metal Engineers vs. UOI (1998) 229 ITR 399 (SC) has held that the process of assessment involves (i) filing of the return of income under s. 139 or under s. 142 in response to a notice issued under s. 142(1) ; (ii) inquiry by the AO in accordance with the provisions of ss. 142 and 143 ; (iii) making of the order of assessment by the AO under s. 143(3) or s. 144; and (iv) issuing of the notice of demand under s. 156 on the basis of the order of assessment. The process of assessment thus commences with the filing of the return or where the return is not filed, by the issuance by the AO of notice to file the return under

s. 142(1) and it culminates with the issuance of the notice of demand under s. 156.

On going through the above precedents, it is manifested that the assessment proceedings come to an end on the issue of notice of demand u/s 156 of the Act. Once a notice of demand is issued, the AO becomes *functus officio* in so far as the completion of assessment is concerned. It consequently follows that issue of notice of demand marks the completion of the assessment. 12. Turning to the facts of the instant case, it turns out that the AO issued notice of demand on 29.12.2011 tantamounting to legally finalizing the assessment, which was just the stage of draft order. As against that, it was incumbent upon him to statutorily pass the final assessment order after the draft order and then issue notice of demand. Issue of notice of demand brings down the curtain on the process of assessment. Until notice of demand is issued, the assessment cannot be said to have concluded.

13. The Hon'ble Madras High Court in *Vijay Television (P) Ltd. Vs. DRP (2014) 369 ITR 113 (Mad.)* was confronted with a situation in which the AO, pursuant to the order of the TPO, passed a final assessment order instead of a draft order. A question arose as to whether the order so passed could be treated as a valid order.

Accepting the contention of the assessee, the Hon'ble High Court set aside the order passed by the AO by observing that: "where there was omission on the part of the AO to follow the mandatory procedures prescribed in the Act, such omission cannot be termed as a mere procedural irregularity and it cannot be cured".

Resultantly, the assessment order was quashed. Almost similar issue came up for consideration before the Hon'ble jurisdictional High Court in *Pr. CIT Vs. Lionbridge Technologies Pvt. Lt. (2019) 260 Taxman 273 (Bom.)* in which the Tribunal in the first round restored the matter to the AO on the ground that the DRP failed to deal with the assessee's objections. During the remand proceedings, a reference was made to the TPO. On receipt of the TPO's order, the AO straightaway passed an order u/s.143(3) r.w.s. 144C(13), which action came to be disapproved by the Hon'ble High Court. It, ergo, follows that the statutorily mandated procedure must be adhered to by the authorities, non-observance of which renders the assessment order null and void.

14. Similar issue came up for consideration before the Pune Benches of the Tribunal in *Skoda Auto India Ltd. Vs. ACIT*. In that case also the AO passed the draft order and simultaneously issued notice of demand and initiated penalty proceedings by issuing notice u/s 274 of the Act. It was thereafter that the final assessment order was passed. The assessee challenged the legality of the final assessment order. Vide its order dated 02-07-2019, the Tribunal in *ITA No.714/PUN/2011* has held that the demand got crystallised on passing of the draft order pursuant to issue of demand notice which is contrary to the relevant provision of the Act. *Ex Consequenti*, the draft order was held to be invalid in law and the consequential assessment order void ab-initio.

15. The ld. DR buttressed his point of view by relying on an order passed by the Hyderabad Benches in *BS Ltd. Vs. ACIT (2018) 94 taxmann.com 346 (Hyderabad-Trib.)* in which it has been held that the issuance of demand notice along with the draft order is only a procedural mistake. In our considered opinion, this case does not advance the Departmental stand. Unlike the assessee in the instant case not raising objections before the DRP and pursuing the appeal straight away before the ld. CIT(A), the assessee in that case adopted the route of the DRP. Be that as it may, it is found that similar issue came up for consideration before the Pune Benches of the Tribunal in series of cases including *Eaton Fluid Power Ltd. Vs. DCIT (2018) 96 taxmann.com 512 (Pune Trib.)*. In that case also, the AO passed the draft order u/s.143(3) r.w.s. 144C(1) of the Act. Thereafter, he issued notice of demand u/s.156 and initiated penalty proceedings u/s.271(1)(c) of the Act. When this infirmity in not following the statutorily mandated procedure was pointed out, the Tribunal declared the assessment order to be without jurisdiction and hence, null and void.

16. It is observed that the facts and circumstances of the instant case are similar to those considered by the Pune Benches of the Tribunal in the case of *Skoda Auto India Ltd. Vs. ACIT (supra)* and *Eaton Fluid Power Ltd. Vs. DCIT (supra)*. As the AO in the extant case issued notice of demand at the stage of the draft order, which, actually ought to have been done at the stage of passing the final order, thereby assigning the finality to the assessment at the stage of draft order itself, we hold that the resultant final assessment order got vitiated in the eyes of law and hence cannot stand.

17. Before parting, we would like to clarify that for the assessment year 2006-07 also, the assessee took similar argument urging that the assessment order be declared null and void. We have noted above that the assessment proceedings get completed on the issue of notice of demand only. On examination of facts, the Tribunal for such earlier year found that even though penalty notice was issued u/s 274 but no notice of demand was issued u/s 156 of the Act pursuant to the draft order. It was under such circumstances that the Tribunal in *ITA No. 1470/Pun/2010* vide its order dated 21.08.2019 did not accept the contention of the assessee to the effect that the assessment got concluded on the passing of the draft order and hence the final assessment order was a nullity. It is an altogether different matter that the initiation of penalty through the draft order carried some infirmity, but that would not impinge upon the validity of the assessment order.

18. To sum up, we set-aside the assessment order by declaring it to be null and void. Thus, the income offered in the return becomes total income of the assessee.”

021. We do not find any reason to multiply the several judicial precedents on the facts of the present case. Therefore, respectfully following the decision of the coordinate bench, we also hold that the present assessment order passed is null and void. Thus, the income offered in the return becomes total income of the assessee.”

We have also perused the decision of coordinate bench of the ITAT on similar issue and identical facts in the case of Marriott International Licensing Company BV Vs. DCIT(IT) 3(2)(1) as referred supra in this order. The relevant part of the decision is reproduced as under:

“10. We have heard the rival submissions and perused the material available on record. It is evident that the A.O. had passed a draft assessment order dated 29.12.2016 and had proposed variation to the return filed by the assessee, thereby determining the assessee to be an eligible assessee. It is observed that the A.O. has issued the draft assessment order along with the notice of demand u/s. 156 and also notice u/s. 271(1)(c) of the Act dated 29.12.2016. The moot question here is whether the A.O.’s action in issuing the demand notice along with the draft assessment order is only a procedural defect or it makes the assessment order bad in law, thereby making it null and void. For this proposition, we would like to place our reliance on some of the decisions cited by the assessee which are as follows:

Sr. No.	Case Law	Citation
1	Vijay Television (P.) Ltd. vs. DRP	[2014] 46 taxmann.com 100 (Madras)
2	Aker Powergas P. Ltd. vs. DCIT0	ITA No. 7211/Mum/2017
3	Perfetti Van Melle (India) Pvt. Ltd. vs. ACIT	ITA No. 9116/Del/2019
4	DCIT vs. Atlas Copco (India) Limited	ITA No. 649/Mum/2013 & 1726/Pun/2014

11. The assessee has relied on the decision of the Hon’ble Madras High Court in the case of Vijay Television (P.) Ltd. (supra), which has held that when there is an omission by the A.O. in following the mandatory procedure prescribed by the law, then the said omission cannot be considered as a mere procedural irregularity and the same cannot be cured. The ld. AR also placed reliance on the decision of the co-ordinate bench in the case of Aker Powergas P. Ltd. (supra), which has held that the issuing of draft assessment order along with the demand notice is said to be not following the mandatory provisions of the Act as per section 144C of the Act, wherein the assessment order was treated as void. The said decision by the Tribunal has considered various decisions of the Hon'ble Apex Court and the Hon'ble High Court decision in the case of Sun Engineering Works and various other decisions. The Tribunal has also held that the participation in subsequent proceedings does not prevent the assessee from challenging the validity of the order by relying on the decision of the Hon'ble Apex Court in the case of CIT vs. V. MR. P. Firm, Mura 56 ITR 67 (SC) and the assessment proceeding culminated on the issue of demand notice and the penalty notice u/s. 274 of the Act, thereby is making subsequent proceedings to be non-est in law. The said decision of the tribunal has also stated that section 156 of the Act does not state a draft demand notice thereby buttressing the contention of the ld.DR that the impugned demand notice was only a draft demand notice. We would also place our reliance on the decision of the co-

ordinate bench in the case of Atlas Copco (India) Limited (supra), which held that the issuance of notice of demand at the stage of draft order has brought a finality to the assessment at the stage of the draft order itself and the resultant final assessment is vitiated in law and is unsustainable. 12. From the above observation, we are of the considered view that the assessment order passed subsequent to the issue of draft assessment order along with the demand notice has been held to be bad in law and not just mere procedural defect. On a perusal of the above decision cited, the issue in hand is identical to the said decisions and we hereby hold that the assessment order dated 14.02.2017 to be null and void.”

9. In the light of the above facts and material placed on record, we find that assessing officer has failed to follow the mandatory procedure laid down u/s 144C of the Act at the stage of passing draft assessment order, therefore, following the decision of Hon’ble High Court and coordinate bench of ITAT as discussed supra we are of the considered view that final assessment order passed is null and void as the mistake committed in passing the draft assessment order is not curable us/ 292B of the Act. Therefore, additional ground of appeal of the assessee is allowed.

10. All the normal ground of appeal filed by the assessee were not discussed before us therefore these grounds of appeal are left open for adjudication if required in future.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 30.06.2023

Sd/-
(Aby T Varkey)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 30.06.2023

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.